



REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO 44 OF 2015

GEORGE KITIYO KAMARY.....PLAINTIFF/RESPONDENT

VERSUS

STEPHEN LOWASIKOU MWOL.....DEFENDANT/APPLICANT

RULING

1. The applicant herein filed the Notice of Motion dated **28/1/2019** seeking orders that:

(a)spent

(b) THAT the execution of the decree and all consequential orders arising from the judgment delivered by this Honourable Court in this suit on 2/2/2018 be stayed pending inter partes hearing and determination of this application.

(c) THAT the execution of the decree and all consequential orders arising from the judgment delivered by this Honourable Court in this suit on 2/2/2018 be stayed pending the hearing and determination of the defendant's appeal to the Court of Appeal against the said judgment and decree arising therefrom.

(d) That the costs of this application be costs in the said appeal.

The Respondent opposed the application and filed a Notice of Preliminary Objection in which he contend that;

(a) The present application is res judicata

(b) The filing of the present application amounts to a flagrant abuse of the due process of this court

(c) That counsel for the applicant should personally be condemned to pay the costs.

3. The Respondent's case is therefore that the application before this court is misplaced as it is *res judicata*; that this court had the opportunity to determine the suit between the parties and judgement was delivered on 7/11/2016 in favour of the plaintiff/respondent; that the defendant vide an application dated 14/3/2018 moved to court for orders of stay pending appeal and attached a notice of appeal dated 8/3/2018; that vide a ruling dated 19/7/2018, this court allowed the application for stay on condition that the applicant deposits Kshs. 900,000/= in a joint interest earning account within 30 days; that no appeal was presented against the said ruling; that the applicant in contempt has to date never deposited the said security and as such the stay was revoked upon failure to deposit the said monies; that on 14/12/2018 this court issued an eviction order against the said defendant.

4. The court has considered the Applicants' notice of motion dated 28/1/2019, the preliminary objection dated 12/2/2019 thereto and the submissions on record. The court is of the view that the preliminary issue for determination is whether the present application is *res judicata*.

5. The substantive law on *res judicata* is found in **Section 7 of the Civil Procedure Act Cap 21** which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

6. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes in that it prevents multiplicity of suits which would ordinarily clog the courts and heaps unnecessary costs on the parties to litigation and defend two suits which ought to have been determined in a single suit and also ensures litigation comes to an end. Disappointed parties are thereby barred from camouflaging already decided cases in new garment in the art of pleadings.

7. In order therefore to determine whether this application is *res judicata*, this court should examine the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain:

(i) **What issues were really determined in the previous case.**

(ii) **Whether they are the same issues in the subsequent case and if were covered by the decision of the earlier case.**

(iii) **Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.**

8. The main ingredients of the *res judicata* were expounded and summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae & 2 Others [2010] eKLR** to be:

i. **Whether there was previous litigation in which identical claims were raised or in which identical claims could have been raised;**

ii. **Whether the parties in the present suit are the same as those who litigated in the original claim;**

iii. **Whether the Court which determined the original claim had jurisdiction to determine the claim;**

iv. **Whether the original action received a final judgment on the merits.**

9. In this proceedings it is the Plaintiff/ Respondent's case inter alia that this application should be dismissed with costs as the same is *res judicata* and an abuse of the court process.

10. Having reviewed the pleadings in this suit and considering the submissions by counsel for the Plaintiff/Respondent, it is not in dispute, that there exists a ruling on stay of execution pending appeal dated 19/7/2018

11. Looking at the circumstance of the present application as well as the previous application, I am convinced that the ruling of this court delivered on 19/7/2018 settled this matter in totality with regards to the prayers being sought. This in my view was a final decision on the issue of stay of execution.

12. The ruling was clear to the effect that:

“In this case I have come to the conclusion that the application for stay was brought timeously and that the applicant would suffer loss were the orders herein sought not issued.

Consequently, I find that application dated 14/3/2018 has merit. I therefore grant the application in terms of prayer No 3 thereof and order that the applicant shall, as a condition for the granting of that order , deposit within 30 days of the orders herein the sum of Ksh 900,000/= into an interest earning account opened in the joint names of the advocates for the both parties.”

13. From the record, I also note that the Defendant/ applicant did not challenge that ruling on Appeal and therefore trial of the present application in my view would amount to this court sitting on appeal on its own decision. This court has no jurisdiction to overturn the said ruling save on an application for review which the instant application is not.

14. In **E.T vs Attorney General & Another (2012) eKLR** it was held that:

“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.....”

15. The upshot of the foregoing is that issues in this application were conclusively decided vide the ruling delivered by this court on 19/7/2018 and therefore the present application is *res judicata* and an abuse of the court process. The same is therefore dismissed with costs to the Respondent.

Dated, signed and delivered at Kitale on this 9th day of April, 2019.

MWANGI NJOROGE

JUDGE

9/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the applicant

N/A for the respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

9/04/2019